Supreme Court of the United States

October Term, 1978

No. 78-712

ARA SERVICES, INC., Petitioner,

versus

SOUTH CAROLINA TAX COMMISSION, Respondent.

BRIEF OPPOSING PETITIONER'S PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Was the tax imposed by the respondent, the state taxing authority, upon the petitioner, ARA, in violation of the constitutional principle that a state cannot subject to taxation the federal government or its instrumentalities?

II. Was the taxpayer denied due process of law under the Fourteenth Amendment to the Constitution upon the issuance by the State Supreme Court of its decision that the record supported a finding that the taxpayer was liable for negligence penalties under the state statutes?

ARGUMENT ON QUESTION I

THE TAXES IN ISSUE ARE IMPOSED UPON ARA AND NOT THE FEDERAL GOVENMENT OR ITS INSTRUMENTALITIES; THERE IS THEREFORE NO QUESTION OF IMMUNITY UNDER THE UNITED STATES CONSTITUTION AND THE DECISIONS OF THIS COURT.

ARA, the petitioner, is engaged in the business of preparing and selling prepared meals. Meals were sold upon which the tax is based to fourteen (14) eleemosynary-type organizations that were not federal agencies or instrumentalities. The organizations conducted summer lunch programs for indigent children and received financial support under the National School Lunch Act, 42 U. S. C. A. § 1751, et seq. This Act authorizes the Department of Agriculture to provide assistance to states that establish programs for children through the use of "service institutions" called sponsors by the State Supreme Court.

The following is set forth in the decision of the State Supreme Court and was not disputed:

> "ARA entered into a written contract with each of the local sponsors which were referred to in the contracts as 'purchasers'. The preamble of the contract stipulated that '. . . purchaser is desirous of purchasing meals **for consumption by children** under the Special Summer Service Program for Children of the United States Department of Agriculture. . . .' (Emphasis added.) No federal agency was a party to the contract. The Department of Agriculture entered into a separate reimbursement contract with the local sponsors. The reimbursement agreement was for an amount more than that paid by the sponsor to ARA. The contracts between ARA and the sponsors provided as follows: 'Billing shall be made monthly and **purchaser will pay** such billings within ten (10) days of the invoice date.' (Emphasis added.)" (Page 3-A of Petition)

The State Supreme Court found that after the sponsors purchased the meals there was no sale of the meals either to the children or to the Department of Agriculture. It expressly held however that there was a contract between the Department and sponsors which was one of reimbursement.

> "* * * . We are of the opinion that the fact that the Department of Agriculture reimbursed the sponsors for their costs does not convert the giving of meals from the sponsors to the children into a sale. The Department of Agriculture never owned the meals, and the sponsors were obligated to pay for them regardless of whether they were ever reimbursed by the Department." (Page 5-A of Petition)

Petitioner now states that the State Supreme Court determined that the sponsors and the federal government for the purpose of the lunch program were the same. Petitioner further says that the sponsors were agents of the federal government. The undisputed facts and the findings of the State Supreme Court set forth above from the record however directly contradict these statements.

The Brief of ARA in the State Supreme Court expressed its position on the issue raised in this petition regarding the legal incidence of the sales tax. We quote from ARA's Brief, pages 17 and 18 the following:

> "The Appellant has asserted that under South Carolina law, the legal incidence of these taxes are on the vendor, rather than the purchaser, and that, therefore, a sale to a federally supported program does not fall within the immunity doctrine. With this assertion in reference to the sales tax portion of the assessment, ARA will agree."

It is well settled by the decisions of this Court that a state sales tax may be imposed upon a nonfederal taxpayer although the economic burden of the tax will ultimately be borne by the government. *Alabama v. King and Boozer,* 314 U. S. 1 (1941); *Kern-Limerick, Inc. v. Scurlock,* 347 U. S. 110 (1954).

Respondent emphasizes in response to the cases *First National Bank v. State Tax Commission,* 392 U. S. 339 (1968); *Federal Land Bank of St. Paul v. Bismarck,* 314 U. S. 94 (1941), cited by petitioner, that the tax in issue is a sales tax. Since 1954 it has clearly been held to be a vendor tax upon sales at retail with no mandatory pass on. Provisions regarding pass on of the tax were made absolutely permissory by § 15(b) of Act #644 of the 1954 General Assembly of South Carolina. For comments on the history of the South Carolina Act, respondent would have the court read the dissenting opinion of District Judge Timmerman in the case *United States v. Livingston* (D. C. S. C.) 179 F. Supp. 9, aff'd 364 U. S. 281, rehearing denied 364 U. S. 855 (1959).

Also attached to this Brief as Appendix A is an opinion of the Comptroller General of the United States dated August 7, 1956, in which the sales tax law in question was held to be a vendor tax without any provision requiring a mandatory pass on.

Petitioner has also cited *United States v. Boyd,* 378 U. S. 51 (1964). *Boyd* upheld a tax on a contractor under the "legal incidence" test although the tax constituted an economic burden on the United States. From the case, we quote the rule.

> "The Constitution immunizes the United States and its property from taxation by the States, M'Cullock v. Maryland, 4 Wheat. 316, 4 L. Ed. 579, but it does not forbid a tax whose legal incidence is upon a contractor doing business with the United States, even though the economic burden of the tax, by contract or otherwise, is ultimately borne by the United States." (Page 44)

In *Boyd,* the contract between the contractor and the government was a cost-plus contract. On a cost-plus basis, the burden of the tax clearly fell upon the government. The Court further, in addition to holding that the legal incidence of the tax was on the contractor, refused to find that the contractor was incorporated into the government structure as to become an instrumentality of the government and enjoy immunity.

Respondent submits that the record of this case shows that the sponsors were not governmental instrumentalities or agents of a governmental instrumentality. Further, the tax on ARA, a contractor with the sponsors, does not violate the principles of constitutional immunity of the federal government from state taxation.

ARGUMENT ON QUESTION II

PETITIONER WAS AFFORDED THE RIGHT TO APPEAR AND DID APPEAR WITH REGARD TO THE PENALTY CLAIM HEREIN AT AN ADMINISTRATIVE HEARING, BEFORE THE TRIAL COURT OF SOUTH CAROLINA AND BEFORE THE STATE SUPREME COURT; DUE PROCESS OF LAW AS AFFORDED BY THE UNITED STATES CONSTITUTION HAS NOT BEEN DENIED.

On or about January 15, 1976, the petitioner received notice from the respondent that as a result of an audit, the sales taxes, interest and negligence penalties were being assessed. A protest of the assessment, including the penalties, was heard by the respondent under the administrative procedure provided by state law. On August 12, 1976, an Order denying the protest was issued. Thereafter, a

revision of the amount of the assessment, including penalties, was made and on December 30, 1976, petitioner paid the taxes, interest and penalties under protest and pursuant to statutes providing for refund claims, brought this action.

The action was instituted in the Court of Common Pleas where all issues joined in the pleadings were heard. Petitioner there was given the opportunity to argue the grounds relied upon in support of the claim and present testimony and evidence. The State Supreme Court, on an appeal filed by the respondent, reversed the findings and order of the lower court with regard to the claim and held that the taxes, interest and penalties were properly assessed.

In the appeal to the Supreme Court, the petitioner filed additional sustaining grounds, one of which related to the penalty. The Court expressly relying upon the additional grounds said:

> "ARA has submitted to the court three additional sustaining grounds. The case was tried by the lower court on stipulations which are included in the record before us. A careful examination of the stipulations convinces us that the lower court would not have been justified in granting relief to ARA on the basis of any of the sustaining grounds enumerated." (Page 6-A of Petition)

Boddie v. Connecticut, 401 U. S. 377 (1971), held that due process of law requires that persons must be given a meaningful opportunity to be heard. Petitioner's protest, as the record shows, was heard at the administrative level, in the Court of Common Pleas and in the Supreme Court. Before all three, the liability for the penalty was in issue. Having afforded the petitioner the right to be heard, the rule of *Boddie* and the other cases cited in *Boddie* has been clearly met.

Upon a conclusion by this Court that due process requirements have been satisfied, respondent submits that there is no federal question which would require the attention of this Court.

CONCLUSION

Based upon the reasons set forth herein, respondent submits that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDICES

APPENDIX A

OPINION OF THE COMPTROLLER GENERAL OF THE UNITED STATES

August 7, 1956

(Sales and Use Taxes — Exemption. — The question of Whether the United States is required to pay for supplies procured in a state at a price inclusive of the sales tax imposed by the state rests upon a determination of whether the incidence of the tax is on the vendor or the vendee. When the tax is imposed on the vendor, as in South Carolina, the United States is not immune from taxation.)

* * * * *

"Reference is made to your letter of July 11, 1956, transmitting a certified invoice in favor of the *** Company, Incorporated, Post Office Box ***, Columbia, South Carolina, covering an open market purchase of supplies in South Carolina. The invoice is in the amount of $13.60, including the South Carolina sales tax, which amounts to 40 cents. Attached to the invoice are copies of letters dated April 19, 1956, from the South Carolina Tax Commission to two Forest Service installations in South Carolina advising such installations that the Commission had determined that the State sales tax "is a vendor type tax as distinguished from a vendee type tax" and that, hence, the vendor is required to pay the tax to the State on sales to the Federal Government. You request a decision as to whether you may certify the full amount of the invoice for payment, including the South Carolina sales tax, without following the procedure described in 19 Comp. Gen. 1002, in view of the ruling of the South Carolina Tax Commission.

In 19 Comp. Gen. 1002 it was held, quoting the syllabus, as follows:

> "Where necessity requires the purchase of gasoline in the open market in North Dakota and the vendor refuses to sell at a price exclusive of the State tax, payment may be made at the vendor's price if he furnishes an appropriate certificate showing the amount of the tax so paid on the purchase, such certificates to be promptly trans-

> mitted to this office for use in obtaining reimbursement from the State for the amount of the tax. 19 Comp. Gen. 822, id. 909, amplified."

The procedure set forth in that decision is not for application where the legal incidence of a State tax is found to be on the vendor. See 21 Comp. Gen. 843 and 24 Comp. Gen. 150.

Concerning the payment of State sales taxes generally, our office has held that the question of whether the United States is required to pay for supplies procured in a State at a price inclusive of the sales tax imposed by the State rests upon a determination of whether the incidence of the tax is on the vendor or on the vendee. Where the incidence of the tax is on the vendor, the United States has no right—apart from State statutory regulations promulgated thereunder by State authorities—to purchase supplies within the territorial jurisdiction of the State on a tax free basis. See Alabama v. King and Boozer, 314 U. S. 1, and 24 Comp. Gen. 150. On the other hand, where the incidence of the tax is on the vendee, the United States in purchasing supplies for official use is entitled under its constitutional prerogative to make purchases free from State taxes and to recover any amount of such taxes which may have been paid by it. See 33 Comp. Gen. 453.

The sales tax law of South Carolina appears in Section 65-1401 to 65-1411 of the 1952 Code of that State, as amended. Section 65-1401 imposes upon every person engaged or continuing within the State in the business of selling at retail any tangible personal property whatsoever, including merchandise and commodities of every kind and character, a tax equal to three percent of the gross proceeds of sales of the business. Section 65-1407 provides in effect that the vendor may add to the sales price the amount of the tax. Section 65-1409 provides that the failure to pass the tax on to the purchaser shall in no way relieve the vendor from paying the tax.

It is obvious from the above-cited provisions of South Carolina Law that the tax in question is a tax on the vendor.

Although under Section 65-1407 the vendor may pass on the tax to the vendee, this is not mandatory and the vendor's failure to do so does not affect his liability for the tax. Thus, it is clear that the legal incidence of the tax is on the vendor rather than the purchaser, and consequently, the constitutional principle under which the Federal Government is immune to State taxation is not for application here. See Esso Standard Oil Company v. Evans, 345 U. S. 495, and 24 Comp. Gen. 150.

In view of the foregoing you are advised that the invoice in question may be certified for payment in the full amount, provided it is determined that the vendor involved here regularly sells to the general public at the specified price plus a charge for "tax." However, there would be no necessity for following the procedure described in 19 Comp. Gen. 1002, since the legal incidence of the tax is not on the vendee.

The Invoice is returned herewith."

APPENDIX B

SECTION 15.(b) Section 65-1407, 1952 Code, amended —additions to sales price made permissive instead of mandatory.—

(b) Section 1407, of Chapter 15, of Title 65, Code of Laws for 1952, is hereby amended by striking out all of the first paragraph of said Section and inserting in lieu thereof the following:

"Every person or company engaged in or continuing within this State in a business for which a license or privilege tax is required by this Article, may add to the sales price the following:"

so that said Section, when so amended, shall read as follows:

Section 1407. Every person or company engaged in or continuing within this State in a business for which a license or privilege tax is required by this Article, may add to the sales price the following:

(1) No amount on sales of ten cents or less;

(2) One cent on sales of eleven cents and over, but not in excess of thirty-five cents;

(3) Two cents on sales of thirty-six cents and over, but not in excess of sixty-five cents;

(4) Three cents on sales of sixty-six cents and over, but not in excess of one dollar; and

(5) One cent additional for each thirty-three cents or major fraction thereof in excess of one dollar.

But in no case shall the amount to be added to the sales price of any single article exceed the following sums:

(1) Twenty-five dollars on any article the sales price of which does not exceed fifteen hundred dollars;

(2) Forty dollars on any article the sales price of which is above fifteen hundred dollars but not exceeding three thousand dollars; and

(3) Seventy-five dollars on any article the sales price of which exceeds three thousand dollars."